

## THE CITIZENSHIP CLAUSE, ORIGINAL MEANING, AND THE EGALITARIAN UNITY OF THE FOURTEENTH AMENDMENT

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Section 1 of the Fourteenth Amendment begins by making clear that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>1</sup> Questions about the scope of this birthright citizenship rule were largely settled by the late nineteenth century,<sup>2</sup> and Congress has stepped in to provide statutory citizenship to those individuals born in the United States—namely Native Americans—who have been found not to be constitutional birthright citizens.<sup>3</sup> The only remaining controversy regarding the scope of the Citizenship Clause involves whether children born to unauthorized immigrants (a category unknown at the time the Citizenship Clause was adopted), are “subject to the jurisdiction” of the United States, thus making them birthright citizens. This question launched an extended debate in the late twentieth century among scholars and advocates, largely as the result of the publication by Peter Schuck and Rogers Smith of *Citizenship Without Consent* in 1985, in which they argue that the original understanding of the Citizenship Clause did not support extending the *jus soli* rule to the children of the unauthorized.<sup>4</sup>

For all practical purposes, this debate has been resolved. Though renewed interest over the last few years in immigration reform has prompted the introduction of legislation in Congress to deny the

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1 U.S. CONST. amend. XIV, § 1, cl. 1.

2 See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding that the children of Chinese immigrants born in the United States were citizens under Section 1 of the Fourteenth Amendment, even though their parents were not eligible for naturalization under then-existing law).

3 See *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that the Fourteenth Amendment’s Citizenship Clause was not intended to apply to the children of members of Indian tribes born in the territory of the United States).

4 See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

children of the unauthorized *jus soli* status, these measures have been political non-starters,<sup>5</sup> in large part because of the widespread view that the Supreme Court would strike down any such legislation as unconstitutional. In his contribution to this Symposium, Rogers Smith contends that the repeated acquiescence—of the people and of Congress—in the application of the Citizenship Clause to the children of the undocumented has established the constitutionality of the practice, regardless of the scope of the Clause as it was originally understood. And thus, my purpose in this Article is not to provide yet another response to the Schuck and Smith thesis,<sup>6</sup> either by returning to the legislative debates surrounding the addition of the Clause to the Fourteenth Amendment, or by challenging the validity of original meaning interpretation. Instead, I accept the relevance of originalism to constitutional interpretation and take the debate over the scope of the Citizenship Clause as an occasion to reflect on three central challenges to the project of giving contemporary interpretive significance to constitutional history.

Understanding the scope of the Fourteenth Amendment's Citizenship Clause through an originalist lens requires that we address three important questions. First, how do we understand the meaning of a constitutional provision that had a specific purpose when it was drafted but was nonetheless written in general language (to overrule *Dred Scott v. Sandford*<sup>7</sup> but with neutral *jus soli* language)? Second, what weight do we assign the Supreme Court's first attempts to interpret the provision after its passage (the extension of the Citizenship Clause to children of immigrants not eligible for citizenship in *Wong Kim Ark*<sup>8</sup>)? And third, how do we treat the original meaning of a constitutional provision when the source of constitutional debate today stems from a set of facts that could only have been perceived dimly, if

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5 For a scholarly claim to this effect, see PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 15 (2008) (observing that the debate over the citizenship of children of the undocumented is settled and that, even at the height of anti-immigrant sentiment in the mid-1990s, no bill proposing to deny the children of the unauthorized citizenship was voted out of committee, as well as the fact that such proposals have been roundly criticized by the press).

6 For examples of such responses, see Gerald Neuman, Professor, Columbia Law Sch., Statement Before Congress (1995), reprinted in T. ALEXANDER ALEINIKOFF, ET AL., *IMMIGRATION AND CITIZENSHIP LAW AND POLICY* (2008); T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 127–28 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000).

7 60 U.S. (19 How.) 393 (1857) (holding that blacks were not citizens for the purposes of the Diversity Clause, because they were not regarded as capable of being part of the national political community at the time the Constitution was adopted).

8 *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

they were considered at all, at the time the provision was drafted and ratified (whether the Clause extends to children of unauthorized immigrants—a category of persons that did not exist in 1868)?

The Citizenship Clause appears to establish a nearly universal *jus soli*, or birthright, rule: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside.”<sup>9</sup> Our starting point should be to lay out what we know about how this Clause was understood at the time it was adopted. Importantly, however, that inquiry should extend to a consideration of how we understand the meaning of the Citizenship Clause in the context of the Fourteenth Amendment as a whole. My argument ultimately is that if we understand the Fourteenth Amendment to embody an anti-caste or anti-subordination principle, then we ought to read the Citizenship Clause in that spirit. It ought to be given an egalitarian construction—a construction supported both by the original understanding of the Citizenship Clause and of the Fourteenth Amendment read as a whole, as well as by the early Supreme Court cases interpreting the Amendment.

The Citizenship Clause, read in historical and textual context, represents our constitutional reset button. It places all people, regardless of ancestry, on equal terms at birth, with a legal status that cannot be denied them. This egalitarian conception of citizenship status, in turn, ought to inform how we understand not just the significance of the status of citizenship, but also the privileges and immunities of citizenship—a conclusion whose elaboration is beyond the scope of this brief Article but that should nonetheless frame the way we understand the significance of the Fourteenth Amendment in our history.

With respect to the original, specific intent of the Citizenship Clause, we know a few things about its original significance. First, it is clear that it was intended to overrule the specific holding of *Dred Scott*—that blacks could not be citizens of the United States.<sup>10</sup> This purpose was re-enforced several years later when Congress, pursuant to its naturalization power, passed a statute lifting restrictions on the naturalization of persons from Africa. By extension, we can also reasonably conclude that the Clause was intended to reject the conception of citizenship embodied in *Dred Scott*—that it was a function of the status or perceived capacities of blacks at various stages of Ameri-

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9 U.S. Const. amend. XIV, § 1, cl. 1.

10 See SCHUCK & SMITH, *supra* note 4, at 74–77.

can history, or of whether a temporal majority or national polity understood blacks to be capable of being citizens. In a sense, the Citizenship Clause enacted a prophylactic rule against the majority's ability to deny persons born in the United States the legal status of citizenship based on prejudice, or their socially constructed capacity for citizenship. By overruling *Dred Scott*, then, the Citizenship Clause stands for the principle that citizenship is not earned; it is indefeasible (except eventually through the individual's choice to renounce and other limited circumstances).<sup>11</sup>

Second, we know that the rule was understood to extend beyond the specific case of former slaves or African Americans born in the United States, but that it was not understood to be truly universal—a fact reflected in the “subject to the jurisdiction thereof” qualification, whose meaning has been much debated since Schuck and Smith forced attention to the issue in 1985. The Clause made clear that the common law rule of birthright citizenship, which up until the Civil War was understood to be the citizenship rule,<sup>12</sup> at least as applied to whites, now applied without regard to race. (At common law, the *jus soli* rule excluded children of diplomats and invading or occupying armies.) That said, it was clear that the drafters of the Amendment did not intend for Native Americans to qualify<sup>13</sup>—perhaps the proximate cause for the Clause's “subject to the jurisdiction thereof” qualification. The lingering question at the time was whether the Clause's general language would extend to the U.S.-born children of Chinese immigrants (and Gypsies), who were ineligible themselves for citizenship. The possibility that the Clause's general language would reach Chinese children was raised and debated in Congress, but it was not directly answered,<sup>14</sup> and ambiguity as to whether the Clause extended to the children of Chinese immigrants persisted until the Supreme Court interpreted the Clause in *Wong Kim Ark*.<sup>15</sup>

And thus, even if we can safely say that the birthright citizenship rule endows native-born Americans with equal legal status, we remain unclear as to how far this endowment extends, at least based on orig-

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11 See, e.g., *Afroyim v. Rusk*, 387 U.S. 253 (1967) (holding that a citizen's participation in a foreign election did not reflect specific intent to renounce U.S. citizenship).

12 See SCHUCK & SMITH, *supra* note 4, at 42–71.

13 *Id.* at 80–82.

14 *Id.* at 77. Also of note is the fact that President Johnson's veto message accompanying the Civil Rights Act of 1866—the statutory precursor to the Citizenship Clause—interpreted the statute as applying to the Chinese and Gypsies. See *Wong Kim Ark*, 169 U.S. at 682 (citing President Johnson's veto message).

15 See Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868–1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519, 519–20 (2001).

inal meaning. Because the original meaning does not answer this question in any specific sense (and in my view, even if it did, that answer would not be dispositive), we must look for some kind of principled basis for addressing the scope question—one that we might nonetheless draw from the original and enduring ethos of the Fourteenth Amendment as a whole.

Again, in the nineteenth century, the open question as to scope was whether children born to immigrants who were not eligible to become citizens were covered. Today's analogue is the debate over whether the children of unauthorized immigrants fall within the purview of the Clause—a question that would have made little sense at the time of the Amendment's framing given that the category of "illegal immigrant" is largely a modern invention.<sup>16</sup> The way the Supreme Court addressed the former question in *Wong Kim Ark* is ultimately instructive as to how we might answer the latter question. Indeed, the two cases strike me as similar in all meaningful respects—they both involve immigrant parents ineligible for full membership in the polity, or immigrant populations that were tolerated but disdained or considered legally erasable. The Court's rejection in *Wong Kim Ark* of the notion that children born to parents ineligible for naturalization were not themselves the subject of the Citizenship Clause is a powerful rejection of the idea that one's status depends on his parent's status. The question thus becomes how much weight we ultimately can assign this conclusion.

My view is that, because the anti-inheritance rule is consistent with the egalitarian ethos and design of the Fourteenth Amendment as a whole, there should be a strong presumption in its favor. This rejection of inheritance as a basis for standing in society is clearly present in the Constitution's rejection of titles of nobility<sup>17</sup> and is arguably a defining feature of American constitutional rights, with its focus on the individual. Indeed, the principle that children or individuals ought not be bound by the status of their parents or ancestors pervades equal protection jurisprudence. In his dissent in *Korematsu v. United States*, Justice Jackson wrote: "Now, if any fundamental assumption underlies our system, it is that guilt is personal and not in-

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16 For a discussion of the historical evolution of the category of illegal immigrant, see MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004).

17 See Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 76 (1997).

heritable.”<sup>18</sup> And in *Plyler v. Doe*,<sup>19</sup> Justice Brennan’s protection of the rights of unauthorized school children to attend the public schools is anchored in this same innocence principle—a concept that has deep roots in the original design of the Citizenship Clause.

Though the Court in *Wong Kim Ark* did not put its holding in precisely these anti-inheritance terms, it did mobilize the Equal Protection Clause’s prohibition on race discrimination and the view expressed in the *Slaughter-House Cases*<sup>20</sup>—that citizenship is possessed without regard to ancestry—to interpret the scope of the Citizenship Clause. The Court emphasized that the purpose of the Fourteenth Amendment was to extend the common law rule without regard to race, thus harmonizing the Citizenship Clause with the overriding purpose of the Amendment—an intent that could not be squared with denying native-born Chinese children citizenship.<sup>21</sup> What is more, in one particularly interesting passage, the Court asked how citizenship could be denied to the children of the Chinese when it extends to the children of Scottish, German, and other immigrants.<sup>22</sup> In this sense, *Wong Kim Ark* seems to be adapting the anti-inheritance presumption for an immigrant society. How can a society fed by immigrants maintain its commitment to equality without a citizenship rule that ignores the status of the parent?<sup>23</sup>

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18 323 U.S. 214, 243 (1944) (Jackson, J., dissenting). He continued by writing, “[H]ere is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.” *Id.*

19 457 U.S. 202, 223 (1982) (observing that the Texas state law denying undocumented school children access to the public schools “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status”).

20 83 U.S. (16 Wall.) 36 (1873).

21 On this point, it may be possible to distinguish *Wong Kim Ark* from the case of unauthorized immigrants on the ground that the concern in *Wong Kim Ark* was that the excluded class was defined solely in terms of race, whereas the children of unauthorized immigrants are not necessarily excluded on the basis of race, though it is hard to escape the possibility that race would come to define the excluded class of children of the undocumented.

22 *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898).

23 The dissent emphasized the feudal nature of the common law rule and contested the notion that birth in a territory denotes allegiance to that territory, arguing instead that a child is connected to the body politic through the “moral relations of his parentage.” *Id.* at 708 (Fuller, C.J., dissenting). And thus we have two unappealing principles at war with one another—that loyalty is determined by allegiance owed at birth to a land and its lord, and that status is inherited.

More generally, the Fourteenth Amendment as a whole protects even “disfavored” individuals,<sup>24</sup> suggesting support for an anti-subordination view of the Amendment.<sup>25</sup> The right question to ask when assessing the scope of the Citizenship Clause, then, is what would be its most egalitarian interpretation. Apart from the clear objects of the Jurisdiction Clause—namely Native Americans (leaving aside the possibility that *Elk v. Wilkins*<sup>26</sup> was wrongly decided), the children of diplomats, and the children of invading or occupying armies<sup>27</sup>—the more egalitarian rule is a universal birthright rule, not a rule that ties the status of children to their parents.

To be sure, the fact that the Equal Protection Clause extends to all persons but that the Privileges and Immunities Clause applies only to citizens could be read to suggest that the Constitution tolerates tiers of membership. Under this view, the failure to extend the Citizenship Clause universally would not necessarily give rise to a caste system because all persons without regard to status are shielded from arbitrary treatment by the government (though not by the federal government until 1954). The rights-protective spin on this reading, of course, is that cases like *Yick Wo*<sup>28</sup> and the universal language of the Equal Protection Clause actually mean that the significance of citizenship is limited, and thus inequalities in the transmission of citizenship might not threaten the egalitarian ethos of the Amendment.

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24 See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (applying the Equal Protection Clause to the Chinese and declaring a laundry permit ordinance unconstitutional as applied because of racial disparities in its application).

25 In the same era in which the Court decided *Wong Kim Ark* and *Yick Wo*, it also outlined an anti-subordination theory of the Equal Protection Clause by striking down a West Virginia state law that barred blacks from serving on juries, observing that the Amendment was meant to protect the former slaves from “unfriendly” legislation. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

26 112 U.S. 94 (1884).

27 Each of these examples is distinguishable from the case of the children of unauthorized immigrants. The children of diplomats and invading and occupying armies are clearly citizens of foreign powers with no claim to long-term residence or loyalty to the United States, despite their territorial presence, and they are not subject to the laws of the United States as children of unauthorized immigrants would be. The case of Native Americans is more difficult because, as Schuck and Smith have shown, they were subject to the jurisdiction of the laws of the United States and understood in the ordinary sense of being punishable for violating the laws of the United States. And yet, a strong case can be made that Native Americans are *sui generis*. They always have been thought to have some kind of quasi-sovereign status and are therefore conceptually distinguishable from all other persons subject to the jurisdiction of the United States, even if their relationship to the U.S. sovereign is not the arms-length relationship characteristic of diplomats and invaders.

28 *Yick Wo*, 118 U.S. 356.

And yet, if we follow the lead of cases like *Strauder v. West Virginia*,<sup>29</sup> and the work of the Court in the decades after the Citizenship Clause's adoption, I think we can give voice to an anti-subordination ethos that embodies a generalized sense of original meaning and that can help us address the ambiguities that remain as to the scope of the Citizenship Clause. It is at this stage that we cannot avoid experience or consequence-based considerations whose full significance can only be seen in light of recent history (though again, even as early as *Wong Kim Ark*, the Court appeared attuned to the consequences of a limited reading of the Citizenship Clause for a society made up of racially diverse immigrants). It is hard to escape the reality that has led societies without a birthright citizenship tradition to converge in that direction because of the caste-generating consequences of permitting generations of children to grow up without formal citizenship.<sup>30</sup>

In this sense, then, the original meaning of the Citizenship Clause can be said to address circumstances that were not contemplated when it was adopted. A universal *jus soli* rule that limits the jurisdiction-based<sup>31</sup> exceptions to the obvious three cases of diplomats, invaders, and Native Americans, is the broadest egalitarian construction we can give to the Clause. It is thus consistent with the Clause's original meaning as understood in the context of the Amendment as a whole because it eschews the notion that parentage, ancestry, race, or any other inherited characteristic determines citizenship status. That this is true is only strengthened by the empirical conclusions about the emergence of castes within societies with exclusive citizenship policies discussed above.

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29 100 U.S. 303.

30 To be sure, countries such as the United Kingdom have amended their *jus soli* rules to make clear that they extend only to the children of persons lawfully present (possibly for permanent residence). See Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 17, 25 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) (explaining the evolution of British citizenship requirements in the post-war era). The Fourteenth Amendment is understood to be an obstacle to such a change in the United States, though it is just as likely that a broad-based commitment to birthright citizenship and unease about transmitting the legal disabilities of parents onto children—a pervasive concern in interpretations of the Fourteenth Amendment present in *Wong Kim Ark*, *Plyler v. Doe*, and Justice Jackson's dissent in *Korematsu*—present an equally significant obstacle.

31 It is worth taking note of the Court's reasoning in *Wong Kim Ark* about the meaning of jurisdiction, which is based on a robust defense of sovereignty according to which even the temporary sojourner is subject to the jurisdiction of the United States. 169 U.S. 649, 683-87 (1897). To hold otherwise would undermine the nation's sovereignty. While this framing may seem heavy-handed or paranoid today, it seems uncontroversial to me to say that jurisdiction extends to unauthorized immigrants and their children.



The *jus soli* rule is not, of course, perfectly egalitarian because it rests on an arbitrary distinction between persons born on opposite sides of a border.<sup>32</sup> The rule is clearly under-inclusive because many persons not born in the United States are de facto members of our society and yet are not automatically entitled to citizenship. And, it is also over-inclusive in that it makes citizens many people who will form no relationship to the United States<sup>33</sup>—a limitation that we accept largely because we understand the rule to be a prophylactic one, or one designed to prevent castes from arising.<sup>34</sup> But that the anti-inheritance principle does not produce globally egalitarian results should not reduce our commitment to reading the Fourteenth Amendment, as it governs the United States as a polity, as inclusively as possible, and thus without regard to parentage.<sup>35</sup> To do so is to be true to the original anti-inheritance ethos of the Fourteenth Amendment's Citizenship Clause, understood in its original textual and historical context.

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<sup>32</sup> See Eisgruber, *supra* note 17, at 59.

<sup>33</sup> See SPIRO, *supra* note 5, at 20–25 (discussing the relationship to the United States of immigrants who give birth to children within the United States but later returned to their home countries, as well as the diasporic communities in the United States).

<sup>34</sup> See Cristina M. Rodríguez, *A Review of Peter Spiro, Beyond Citizenship: American Identity After Globalization* (2008), 103 AM. J. INT'L L. (forthcoming 2009).

<sup>35</sup> Another principle that could be used to defend a universal *jus soli* rule is the responsiveness principle articulated by Chris Eisgruber, according to which the government must be responsive to the interests, or the control, of the members of the polity. See Eisgruber, *supra* note 17, at 72–73. The *jus soli* rule is the best way of ensuring that the members of the polity correspond to who actually lives and works within the society. This principle is particularly salient during moments of large-scale immigration and it also counsels in favor of non-discriminatory and generous naturalization. I think ultimately that among the reasons to value responsiveness is to ensure equality, and to protect disfavored groups from being targeted for arbitrary or oppressive treatment.